

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

UNITED STATES OF AMERICA,

Plaintiff,

vs.

TIMOTHY LAMAR RUSHING,

Defendant.

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Case No. 05-CR-108-TCK

OPINION AND ORDER

Before the Court is the Government’s Motion to Stay Litigation Pending the Tenth Circuit’s Decision in *United States v. Hopper* (Doc. 85).

I. Factual Background

A jury convicted Defendant of two counts of 18 U.S.C. § 924(c), which criminalizes, in relevant part, using or carrying a firearm during and in relation to a “crime of violence,” as that term is defined in 18 U.S.C. § 924(c)(3)(A) & (B). The underlying “crimes of violence” forming the basis of Defendant’s § 924(c) convictions were (1) a Hobbs Act robbery under 18 U.S.C. § 1951 and aiding and abetting under 18 U.S.C. § 2; and (2) carjacking under 18 U.S.C. § 2119 and aiding and abetting under 18 U.S.C. § 2. Defendant filed a 28 U.S.C. § 2255 motion (Doc. 80), challenging his § 924(c) convictions on grounds that § 924(c)(3)(B) is invalid under the reasoning of *Johnson v. United States*, --- U.S. ---, 135 S. Ct. 2551 (2015) (holding that similar language in the Armed Career Criminal Act (“ACCA”) was unconstitutionally vague).

The United States moved to stay this § 2255 proceeding pending the outcome of *United States v. Hopper*, Tenth Circuit Case No. 15-2190. *Hopper* presents the issue of whether *Johnson* results in invalidation of 18 U.S.C. § 924(c)(3)(B). The United States moved for stays pending the

outcome of *Hopper* (“*Hopper* motions”) in those § 2255 proceedings in this district presenting a *Johnson* challenge to a § 924(c) conviction.¹

II. Standard

In civil cases, the Tenth Circuit has ruled that “[w]hen applying for a stay, a party must demonstrate a clear case of hardship or inequity if even a fair possibility exists that the stay would damage another party.” *Ben Ezra, Weinstein, & Co., Inc. v. Am. Online Inc.*, 206 F.3d 980, 987 (10th Cir. 2000). This rule vindicates the underlying principle that a party’s right to proceed in court should not be denied except under the most extreme circumstances. *Commodity Futures Trading Comm’n v. Chilcott Portfolio Mgmt., Inc.*, 713 F.2d 1477, 1484 (10th Cir. 1983). A criminal defendant’s right to proceed on a § 2255 motion is equally if not more important than a civil litigant’s right. *See Yong v. I.N.S.*, 208 F.3d 1116, 1120 (9th Cir. 2000) (explaining that “habeas proceedings implicate special considerations that place unique limits on a district court’s authority to stay a case in the interests of judicial economy”). Accordingly, if the United States cannot satisfy the above-quoted standard, it is certainly not entitled to a stay in this habeas proceeding.

¹ Other judges in this district granted *Hopper* motions either without explanation or in furtherance of judicial economy. *See, e.g., United States v. Wright*, 12-CR-197-GKF, Doc. 216 (minute order); *United States v. Usher*, 93-CR-114-JHP, Doc. 29 (minute order); *United States v. Myers*, No. 12-CR-0196-02-CVE, 2016 WL 4479489, at *8 (N.D. Okla. Aug. 24, 2016) (“[I]n the interest of judicial economy, this claim of defendant’s § 2255 motion should be stayed. It would be a waste of judicial resources for this Court to decide an issue that is likely to be resolved in an appeal pending before the Tenth Circuit.”); *United States v. Gregory*, 07-CR-73-JED, Doc. 41 (“[I]n the interest of judicial economy, this claim of defendant’s § 2255 motion should be stayed. It would be a waste of judicial resources for this Court to decide an issue that is likely to be resolved in an appeal pending before the Tenth Circuit.”).

III. Analysis

The United States failed to meet its burden for staying these proceedings pending the outcome of *Hopper*. Defendant's § 2255 motion presents a threshold question of whether the companion crimes to Defendant's § 924(c) convictions qualify as crimes of violence under 18 U.S.C. § 924(c)(3)(A). *See United States v. Nguyen*, No. 16-CV-1231-JTM, 2016 WL 4479131, at *3 (D. Kan. Aug. 25, 2016) (denying § 2255 motion challenging § 924(c)(3)(B) on grounds that a Hobbs Act robbery is a crime of violence under § 924(c)(3)(A)); *United States v. Melgar-Cabrera*, Case No. 09-2962, slip op. (D.N.M. August 24, 2015) (same); *see also In re Fleur*, 824 F.3d 1337, 1341 (11th Cir. 2016) (denying authorization to file second or successive habeas petition challenging constitutionality of § 924(c)(3)(B) because Hobbs Act robbery violations, as alleged in the Indictment, satisfied § 924(c)(3)(A)).² Regardless of the outcome of *Hopper*, the Court likely must consider § 924(c)(3)(A) as a possible basis for upholding the convictions before addressing the constitutionality of § 924(c)(3)(B).

Further, as this Court has previously expressed, it has concerns about staying § 2255 proceedings solely in the interest of “judicial economy” pending the outcome of a decision by a higher court. *See United States v. Daugherty*, No. 07-CR-87-TCK, 2016 WL 4442801, at *4 (N.D. Okla. Aug. 22, 2016) (citations omitted) (denying motion to stay pending United States Supreme Court's decision in *Beckles v United States*, which presents issue of retroactivity of *Johnson* rule as applied to sentencing guidelines); *United States v. Fisher*, No. 00-CR-33-TCK, 2016 WL 4442800, at *3 (N.D. Okla. Aug. 22, 2016) (same). In those cases, the Court reached the merits of the

² The Court is not aware of similar cases discussing whether carjacking is a crime of violence under § 924(c)(3)(A), but the Court desires briefing on this question.

retroactivity issue notwithstanding *Beckles*, held the rule did apply retroactively, and released both defendants from prison.³ Assuming judicial economy could justify a stay, it is not certain that judicial economy will ultimately be furthered. The Court could stay the proceedings but then resolve the case on grounds unrelated to *Hopper*.

IV. Conclusion

The Government's Motion to Stay Litigation Pending the Tenth Circuit's Decision in *United States v. Hopper* (Doc. 85) is DENIED. Defendant's Motion for Permission to File a Supplemental Brief to Amend (Doc. 84) is GRANTED, and the Court construes the motion itself as the supplemental brief.

The United States is ordered to file a response to Defendant's § 2255 motion addressing whether the companion crimes to Defendant's § 924(c) convictions qualify as crimes of violence under § 924(c)(3)(A) and any other threshold issues. If necessary, the United States will be given further opportunity to address the constitutionality of § 924(c)(3)(B), and that issue need not be addressed at this time. The brief shall be filed no later than December 16, 2016.

DATED THIS 18th day of October, 2016.


TERENCE KERN
United States District Judge

³ To the Court's knowledge, other judges in this district granted *Beckles* motions in the interest of judicial economy.